ARGUMENT

OF

WENDELL PHILLIPS, ESQ.

BEFORE THE

COMMITTEE ON FEDERAL RELATIONS,

(OF THE MASSACHUSETTS LEGISLATURE,)

IN SUPPORT OF THE PETITIONS FOR THE REMOVAL OF

EDWARD GREELY LORING

FROM THE OFFICE OF JUDGE OF PROBATE,

FEBRUARY 20, 1855.

BOSTON:
J. B. YERRINTON & SON, PRINTERS.
1855.

ARGUMENT.*

MR. CHAIRMAN AND GENTLEMEN:—

THE petitions offered you on any one topic are usually all in the same words. On the present occasion, I observe on your table three or four different forms. This is very significant. It shows they do not proceed from a central committee, which has been organized to rouse the Commonwealth. They speak the instinctive, irrepressible wish of all parts of the State. It is the action of persons of different parties, sects and sections, moving independently of each other, but seeking the same object. Some persons have sneered at these petitions because women are found among the signers. Neither you, Gentlemen, nor the Legislature, will maintain that women, that is, just one half of the Commonwealth, have no right to petition. A civil right, which no one denies even to foreigners, will not certainly be denied to the women of Massachusetts. And is there any one thoughtless enough to affirm that this is not a proper occasion for women to exercise their rights? These petitions ask the removal of a *Judge of Probate.* Probate Judges are the guardians of widows and orphans. Women have a peculiar interest in the character of such judges. He chooses an exceedingly bad occasion to laugh, who laughs when the women of the Commonwealth ask you to remove a Judge of Probate, who has shown that he is neither a humane man nor a good lawyer. In the whole of my remarks, gentlemen, I beg you to bear in mind that we, the petitioners, are asking you to remove, not a Judge merely, but a Judge of *Probate.* A magistrate who is, in a peculiar sense, the counsellor of the widow and the fatherless.

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The family, in the moment of terrible bereavement and distress, must first stand before him. To his discretion and knowledge are committed most delicate questions, large amounts of property, and very dear and vastly important family relations. Surely, that should not be a rude hand which is thrust among chords which have just been sorely wrung. Surely, he should be a wise and most trustworthy man who is to settle questions on many of which, from the nature of the case, there can, practically, be no appeal. His court is not watched by a jury. It is silent and private, and has little publicity in its proceedings. He should, therefore, be most emphatically, a magistrate able to stand alone; whose rigid independence cannot be overawed or swayed by cunning or able individuals about him; one skillful in the law, and who, while he holds the scales of justice most exactly even, has a tender and humane heart; one whose generous instincts need no prompting from without.

Some object to these petitions, that they ask you to do an act fatal to the independence of the judiciary. The petitioners are asked whether they do not know the value and importance of an independent judiciary. Mr. Chairman, we are fully aware of its importance. We know as well as our fellow-citizens the unspeakable value of a high-minded, enlightened, humane, independent, and just Judge; one whom neither "fear, favor, *affection*, nor hope of reward," can turn from his course. It is *because* we are so fully impressed with this, that we appear before you. Taking our history as a whole, we are proud of the Bench of Massachusetts. You have given no higher title than that of a Massachusetts Judge to Sewall, to Sedgwick, to Parsons. Take it away, then, from one who volunteers, hastens, to execute a statute, which the law, as well as the humanity of the nineteenth century, regards as infamous and an outrage. We come before you, not to attack the Bench, but to strengthen it, by securing it the only support it can have under a government like ours — the confidence of the people. You cannot legislate Judges into the confidence of the people. You cannot preach them into it; confidence must be earned. To make the name of Judge respected, it must be worthy of respect — must never be borne by unworthy men. It never will be either respected or respectable while this man bears it. I might surely ask his removal in the names of the Judges of Massachusetts, who must feel that this man is no fit fellow for them. The special reasons why we deem him an unfit Judge, I shall take occasion to state by and by. At present, I will only add, that it is not, as report says, merely because he differs from us on the question of slavery, that we ask his removal. It is not for an honest

or for any other, difference of opinion, that we ask it; but, as we shall presently take occasion to state, for far other and very grave reasons.

I do not know, gentlemen, what course of remark the remonstrant, or his counsel, may adopt; but I have thought it necessary to say so much, in order that they may understand our position, and thus avoid any needless enlargement upon our want of respect for the function, or appreciation of the value, of an independent, high-minded Judiciary. You will see, in the course of my remarks, that it is because this incumbent has sinned against that characteristic that we appear here.

Gentlemen, these petitions, though variously worded, all ask you to "take proper steps for the removal of Edward Greely Loring from office"—"*proper steps.*" It is for the Legislature to decide what the "proper steps" are.

In proceeding to remark on the proper method of procedure in this case, you will bear in mind, that I necessarily, perhaps, go over more ground than the progress of this discussion may show to have been necessary; because, of course, I must be entirely ignorant what ground the remonstrant, or his counsel, will take. I must, therefore, cover *all* the ground.

You are of course aware, gentlemen, that, originally, all Judges were appointed by the king, and held their offices as long and on such conditions as he pleased to prescribe. Some held as long as they behaved well—*during good behavior*, as our Constitution translates the old law Latin, *quamdiu se bene gesserint;* others held during the pleasure of the king—*durante bene placito*, as the phrase is. This, of course, made the Judges entirely the creatures of the king. To prevent this, and secure the independence of the Judges, after the English Revolution of 1689, it was fixed by the Act of Settlement, as it is called, that the king should not have the power to remove Judges, but that they should hold their offices "*during good behavior.*" They were still, however, removable by the king, on address from both Houses of Parliament.

Hallam, in his Constitutional History, states very tersely the exact state of the English law, and it is precisely the law of this Commonwealth also, in these words,—"No Judge can be dismissed from office except in consequence of a conviction for some offence, OR *the address of both Houses of Parliament*, which is tantamount to an act of Legislature." (*Const. Hist., Am. Edit.*, p. 597.)

To come now to our Commonwealth. There are, as I have just intimated, two ways of removing a Judge, known to the Constitution; one is, by impeachment; and the other is, by address of the Legislature to

the Governor. A Judge who commits a crime, whether in his official capacity or not, may be punished by indictment, precisely as any other man may — this principle may be left out of the question. A Judge, who, sitting on the Bench, transgresses the laws in his official capacity, may be impeached by the House of Representatives before the Senate, as a Court of Impeachment, and removed. (*Const. Mass., Chap.* 1, *Sec.* 2, 8.)

The petitioners do not ask you to impeach Judge Loring. Why? Because they do not come here to say that he has been guilty of *official misconduct.* To render a Judge liable to impeachment, he must be proved to have misconducted *in his official capacity.* I shall not go into the niceties of the law of impeachment. One would suppose from the arguments of the press at the present time, and their comments on Mr. Loring's remonstrance, that a Judge could not be impeached unless he had violated some express law. This is not so. It has been always held, that a Judge may be guilty of *official misconduct*, and liable to impeachment, who had not violated any positive statute. It is enough that the act violates the principles of the common law. All authorities agree in this, and some would seem to lay down the rule still more broadly. (See Story on the Const., Bk. 3, ch. 10, §796–8, and Shaw's argument when counsel against Prescott, — Prescott's Trial, p. 180.) As the Constitution confines the process of impeachment to cases of *official misconduct*, and as we do not pretend that Mr. Loring, *sitting as a Judge of Probate*, has been guilty of any such, I pass from this point.

But the Constitution provides another form, which is, that a Judge may be removed from office by address of both Houses to His Excellency, the Governor. In the first place, gentlemen, let me read to you the source of this power. "All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior, excepting such concerning whom there is a different provision made in this Constitution : provided nevertheless, the Governor, with consent of the Council, may remove them upon address of both Houses of the Legislature." (Cons. of Mass., Chap. III., Art. 1.) "*Provided nevertheless*, the Governor, with consent of the Council, may remove him upon the address of both Houses of the Legislature." Now, gentlemen, looking on the face of that, it would be naturally inferred that, notwithstanding his "good behavior," and without alleging any violation of it, a Judge could, nevertheless, be removed by address; that an "address" need not be based on a charge of official misconduct,—that an "address" need not be based on a charge of illegal conduct, in any capacity.

This seems so clear, that I should have left this point without further remark, if Mr. Loring had not placed upon your files a remonstrance against the prayer of these petitioners, which remonstrance (I shall not occupy your time by reading it) is based upon the principle, that it would be a hard and unjust procedure if either House should address the Governor against him, seeing that he has not violated any State law, or done any thing that was illegal, or that was prohibited by the laws of Massachusetts, and alleging that he has only acted in conformity with the official oath of all officers of the State to support the Constitution of the United States. The defence of the remonstrant, as far as we are informed of it, is, that he ought not to be removed, because he has violated no *law* of Massachusetts. To that plea, gentlemen, I shall simply reply: the method of removing a Judge by "address" does not require that the House or Senate should be convinced that he has violated any law whatever. Grant all Mr. Loring states in his remonstrance,—that he has broken no law,—that he stands legally impeccable before you; which, in other words, is simply to say that he cannot be indicted. If he had violated a law, he could be indicted; he comes to this House and says, in effect, "Gentlemen, I cannot be indicted, *therefore*, I ought not to be removed." The reply of the petitioners is, a man may be unfit for a Judge, long before he becomes fit for the State Prison. Their reply is, (leaving for the time all question of impeachment,) it is not necessary that a Judge should render himself liable to indictment, in order to be subject to be removed by "address." He can be removed (as my brother who preceded me [SETH WEBB, JR., Esq.] has well said) for any cause which the Legislature, in its discretion, thinks a fitting cause for his removal. Even if he has not violated any law of the Commonwealth, written or unwritten, still he may be removed, if the Legislature thinks the public interest demands it. The matter is entirely within your discretion. My proof of this is, first, the language of the Constitution. The Constitution says: "The Senate shall be a Court with full authority to hear and determine all impeachments made by the House of Representatives against any officer or officers of the Commonwealth, for misconduct and mal-administration in their offices." (Chap. I., Sec. 2, Art. 8.) Now, suppose it true, as some claim, that such *misconduct* must amount to a violation of positive law, that nothing short of that will justify impeachment; the mere fact that the Constitution provides another way, would be *prima facie* evidence that it meant to lay a broader foundation for removal; else, why *two* methods? If, in his office, he had outraged the laws of the State, he could be impeached. Is not one remedy sufficient? Why does the Constitution

provide another? Because the people, through their Constitution, meant to say, "We will not have Judges that cannot be removed unless they have violated a statute. We will provide, that in case of any misconduct, any unfitting character, any incapacity or loss of confidence, the supreme power of the Legislature may intervene and remove them." If impeachment applies only to *official* misconduct, expressly prohibited by statute, as seems to be claimed, then, from the existence of another additional method in the Constitution, one would naturally infer that this other power refered to misconduct *not* official, and *not* expressly prohibited by statute. In addition to the mere letter of the Constitution, and the inference from the fact of two powers being granted, we have the action of the Commonwealth in times past. I have not time for historical details, but the power of address, whenever it has been used in this Commonwealth, has been used to remove Judges who had not violated any law. Judge Bradbury was removed, I think, for mental incapacity, resulting from advancing age. Of course, intellectual inefficiency is not impeachable; it is not such "misconduct or mal-administration" as renders a man liable to impeachment; but the Constitution, in order to cover the whole ground, has left with the Legislature the power to remove an inefficient Judge — a Judge who has grown too old to perform his duties.

But it happens that this clause of the Constitution has been passed upon,— not, indeed by the Supreme Court, but I may say by equally high authority. It has been expounded by some of the ablest men the Commonwealth ever knew, and in circumstances which preclude the idea of prejudice or passion. It is fortunate for these petitioners, in regard to this claim of the power of the Legislature, (which it is said Mr. Loring's friends intend to deny, and which his remonstrance does practically deny) — it is fortunate for them, that in the Constitutional Convention of Massachusetts, in 1820, this clause of the Constitution was deliberately discussed. It was discussed, gentlemen, not when there was a case before the Commonwealth, when men were divided into parties, when personal sympathy or antipathy might bias men's judgments, but when the debaters were in the most unimpassioned state of mind;— statesmen, endeavoring to found the laws of the Commonwealth on the best basis. The discussion was long and able. I shall read you the sentiments of different gentlemen who took part in that discussion, for this purpose,— to show you that this Legislature has an unlimited power of removal for any cause — whether the law has been violated or not — whether acts were done by a judge in his official capacity or any other, Allow me to remind you, gentlemen, that there are two questions you are

bound to ask. The first is, *Can* we remove a judge who is not guilty of any *official misconduct*, of any violation of statute law, in any capacity? The second is, If we have the power, *ought* we to exercise it in the present case? 1st. Have we this power? 2d. Ought we to exercise it?

I propose to read you extracts from the speeches in the Mass. Conv. of 1820, to show that the Legislature has, in the judgment of our ablest lawyers and statesmen, an unlimited authority to ask the removal of Judges whenever it sees fit, and for any cause the Legislature thinks sufficient: that the PEOPLE, the original source of all power, have not parted with their sovereignty in this respect — did not intend to part with it, and did not part with it. When I have convinced you, if I shall succeed in convincing you, that you have this authority, I shall with your permission say a few words to enforce the other point, that you ought to exercise it according to the prayer of the petitioners.

In the first place, I read the clause of the Constitution: "The Governor, with consent of the Council, may remove them [judicial officers] upon the address of both houses of the Legislature." The Constitutional Convention which met in 1820, appointed a Committee to take this clause into consideration. That Committee consisted of Messrs. Story of Salem, (afterwards Judge Story, of the Supreme Court of the United States,) John Phillips of Boston, (Judge of the Common Pleas Court of Massachusetts, and President of the Senate,) Martin of Dorchester Cummings of Salem, (Judge of the Common Pleas,) Levi Lincoln of Worcester, (afterwards Judge of our Supreme Court and Governor of the Commonwealth,) Andrews of Newburyport, Holmes of Rochester, Hills of Pittsfield, Austin of Charlestown, (High Sheriff of Middlesex county,) Leland of Roxbury, (afterwards Judge of Probate for Norfolk county,) Kent of West Springfield, Shaw of Boston, (present Chief Justice of the Commonwealth,) Marston of Barnstable, Austin of Boston, (since Attorney General of the Commonwealth,) and Bartlett of Medford — a Committee highly respectable for the ability and position of its members. Permit me to read a section of their Report, (p. 136) :—

"By the first article of the Constitution, any judge may be removed from his office by the governor, with the advice of the council, upon the address of a bare majority of both houses of the Legislature — the Committee are of opinion that this provision has a tendency materially to impair the independence of the judges, and to destroy the efficacy of the clause which declares they shall hold their offices during good behavior. The tenure of good behavior seems to the Committee indispensable to guard judges on the one hand from the effects of sudden resentments and temporary prejudices, entertained by the people, and on the other hand, from the influence which ambitious and powerful men naturally

exert over those who are dependent upon their good will. A provision which should at once secure to the people a power of removal in cases of palpable misconduct or incapacity, and at the same time secure to the judges a reasonable permanency in their offices, seems of the greatest utility; and such a provision will, in the opinion of the Committee, be obtained by requiring that the removal, instead of being upon the address of a *majority*, shall be upon the address of *two thirds* of the members present of each house of the Legislature."

The Committee, you see, gentlemen, acknowledge that there is unlimited power; they think that power dangerous; they advise that it should be limited — how? Observe, even this Committee, although they say they think it dangerous, do not advise it should be stricken out; but they advise it should be limited by requiring a two-thirds vote, and this is all.

Remember, gentlemen, that I read the following extracts not to show the opinion of this Convention as to the value or the danger of this power; I merely wish to show you that, in the opinion of the ablest lawyers of the State, the Constitution, as it then stood, (and *it stands now precisely as it stood then*,) gave to this Legislature unlimited authority to remove judges, for any cause they saw fit; and that while all the speakers were fully aware of its liability to abuse, no speaker denied its unlimited extent, or proposed to strike the power from the Constitution. After that report had been put in, the Convention proceeded to take it up for discussion.

The first gentleman who joins, to any purpose, in the debate, is SAMUEL HUBBARD, Esq., perhaps, beyond all comparison, the fairest-minded as well as one of the ablest lawyers of the Suffolk bar; and let me add, that after a life passed in the most responsible practice of his profession, he finished it on the bench of the Supreme Court. His testimony is the more valuable, because Mr. Hubbard thought this provision eminently dangerous. But he says :—

"The constitution was defective in not sufficiently securing the independence of judges. He asked if a judge was free when the Legislature might have him removed *when it pleased*. * * * The tenure of office of judges was said to be during good behavior. Was this the case, when the Legislature might deprive them of their office, *although they had committed no crime?* * * * No Justice of the Peace was allowed to be deprived of his office without a hearing, but here the judges of the highest court might be dismissed without an opportunity of saying a word in their defence."

Then comes Chief Justice LEMUEL SHAW :—

"The general principle was, that they should be independent of the other persons during good behavior. What is meant by good behavior? The faith-

ful discharge of the duties of the office. If not faithful, they were liable to trial by impeachments. But cases might arise when it might be desirable to remove a judge from office *for other causes*. He may become incapable of performing the duties of the office without fault. He may lose his reason, or be *otherwise incapacitated*. It is the theory of our government, that no man shall receive the emoluments of office, without performing the services, though he is incapacitated by the providence of God. It is necessary, therefore, that there should be provision for this case. But in cases when it applies, the reason will be so manifest as to command a general assent. It must be known so as to admit of no doubt, if a judge has lost his reason, or become incapable of performing his duties. As it does not imply misbehavior, if the reason cannot be made manifest so as to command the assent of a great majority of the Legislature, of two-thirds at least, there can be no necessity for the removal. *By the constitution as it stands, the judges hold their offices at the will of the majority of the Legislature.* He confessed with pride and pleasure that the power had not been abused. But it was capable of being abused. If so, it ought to be guarded against. That could be done by requiring the voice of two thirds of each branch of the Legislature."

Then comes WILLIAM PRESCOTT, a name well known here and the world over. He was a man of English make; taciturn, of few words, no diffuse American talker. He spoke little, but each word was worth gold. His rare civil virtues, great ability, and eminently judicial mind, added lustre to a name that was heard in the van of Bunker Hill fight.

"What security have they [Judges] by the constitution? They hold their offices as long as they behave well and no longer. They are impeached when guilty of misconduct. It is the duty of the House of Representatives, constituting the grand inquest of the Commonwealth, to make inquiry — for the Senate to try, and if guilty, to remove them from office. *There may be other cases in which they ought to be removed, when not guilty of misconduct in office, but for infirmity.* Provision is made for these cases, that the two branches of the Legislature concurring with the Governor and Council, may remove judges from office. He did not object to this provision, if it was restrained so as to preserve the independence of the judges. They should be independent of the Legislature and of the Governor and Council. But now, there is no security. The two other departments may remove them without inquiry — without putting any reason on record. It is in their power to say that the judges shall no longer hold their offices, and that others more agreeable shall be put in their places. He asked, was this independence?"

There may be "other cases" in which they ought to be removed when not guilty of misconduct in office, but from infirmity. Is not that exactly what the petitioners claim? There being no misconduct in office, no violation of the precise statutes of the Commonwealth, comes the case described by Mr. Prescott, where a Judge ought to be dismissed for "infirmity" — for we maintain that there was a cruel "infirmity." "He did not object to this provision" if properly restrained, (that was the old Federalist; the man who never was inclined to trust the people too far; the man who was in favor of a strong government!) — "he did not object to this provision;" all he asked was a two-thirds vote.

Then comes Mr. DANIEL DAVIS, of Boston. You may not have known him, gentlemen; but those of us who are older, remember him as the Solicitor General for the Commonwealth of Massachusetts. He says:—

"If the resolution were before the Committee in a form which admitted of amendment, he would propose to alter it in such manner that the officer to be removed should have a right to be heard. No reason need now be given for the removal of a Judge, but that the Legislature do not like him."

He did not deny the power, did not question its utility; all he wanted was, that the officer should be heard. "No reason need be given, but that the Legislature do not like him." Is not this unlimited power? The claim of Mr. Loring is, substantially, that you abuse your power, unless you charge, and prove, that he has offended against a statute "in such case made and provided." Mr. Daniel Davis says—"No reason need be given for the removal of a Judge, but that the Legislature do not like him." That is his idea of the power of this Legislature.

Then comes Mr. HENRY H. CHILDS, of Pittsfield. I do not know his history. He did not want the Constitution changed at all; he did not ask even the two-thirds vote. Mr. Childs says:—

"It was in violation of an important principle of the government, that the majority of the Legislature, together with the Governor, should not have the power of removal from office. This power was in accordance with the principle of the Bill of Rights. It was imperative in the advocates of this resolution to show that it was necessary to intrench this department of the government for its security. They had not shown it; on the contrary, we were in the full tide of successful experiment. The founders of the Constitution intended to put the judiciary on the footing of the fullest independence, consistent with their responsibility."

"This power was in accordance with the provisions of the Bill of Rights." What are these? Section V. of the Bill of Rights reads thus:—

"All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them."

Mr. Loring knew under what condition he was taking office. He knew this provision in the Declaration of Rights, that the people retain all power, and that all magistrates, "vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all

times accountable to them," — in office and out of it. Section VIII. says further: —

"In order to prevent those, who are vested with authority, from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and appointments."

No man has a right to criticise here the manner in which the removal is effected. Let them go elsewhere than to this tribunal, if they say it is a bad power. The people retain the right, at such periods, and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life.

That is the principle of our Declaration of Rights. Mr. Childs says, — "The founders of the Constitution intended to put the Judiciary on the footing of the fullest independence, consistent with their responsibility." Mr. Chairman, I beseech you, in the progress of this discussion, if the remonstrant shall ring changes on the necessity of maintaining the independence of the Judiciary, to remember this remark, that "the founders of the Constitution intended to put the Judiciary on the footing of the fullest independence, *consistent with their responsibility*," — no more.

Then Mr. CUMMINGS, of Salem, afterwards Judge, rose. He says: —

"In this State, they cannot be removed on address of the Legislature, but with the consent of the Council. Was not this a sufficient guard? Another part of the Constitution protects them when accused of crimes. This provision is not intended to embrace cases of crime — it is only for cases when they become incompetent to discharge their duties. May not the people, by a majority, determine whether judges are incompetent?"

Mr. Loring says, "Show me my crime!" Mr. Cummings says, "This provision is not intended to embrace cases of crime."

LEVI LINCOLN, of Worcester, comes next. He was then a Democrat, — since Governor, and Judge: —

"He was entirely satisfied with the constitution as it was. He had never heard till now, and was now surprised to hear, that there was any want of independence in the judiciary. He had heard it spoken of in charges, sermons, and discourses in the streets, as one of the most valuable features of the constitution — that it established an independent judiciary. He inquired was it dependent on the Legislature? It was not on the Legislature nor on the executive. No judge could be removed but by the concurrent act of four coördinate branches of the government — the House of Representatives, the Senate, with a different organization from the House, the Governor, and the Council. Was it to be supposed that all these should conspire together

to remove a useful judge? But it was argued that future Legislatures might be corrupt. This was a monstrous supposition. He would rather suppose that a judge might be corrupt. It was more natural that a single person should be corrupt than a numerous body. The proposed amendment was said to be similar to provisions of other governments. There was no analogy — because other governments are not constituted like ours. It was said that judges have estates in their offices — he did not agree to this doctrine. The office was not made for the judge, nor the judge for the office; but both for the people. There was another tenure — *the confidence of the people*. It was that which had hitherto occurred here. Have we, then, less reason to confide in posterity, than our ancestors had to confide in us?"

Then follows Mr. DANIEL WEBSTER. He had recently come to the State. Joining the debate, he says: —

"As the constitution now stands, all judges are liable to be removed from office by the Governor, with the consent of the Council, on the address of the two houses of the Legislature. It is not made necessary that the two houses should give any reasons for their address, or that the judge should have an opportunity to be heard. I look upon this as against common right, as well as repugnant to the general principles of the government." * * *

"If the Legislature may remove judges at pleasure, assigning no cause for such removal, of course it is not be expected that they would often find decisions against the constitutionality of their own acts."

These are Webster's words; and you will remember, Mr. Chairman, that the Constitution stands, in 1855, just as it stood when Webster was speaking. I cite the language to show what Mr. Webster understood to be the Constitution of Massachusetts — that you could remove a Judge without giving *any* reason; "at your pleasure;" without hearing him. Now, what does he propose to do? Does he propose to strike out that provision? No, Sir! He does not even propose a two-thirds vote:

"In Pennsylvania, the Judges may be removed, 'for any reasonable cause,' on the address of *two thirds* of the two Houses. In some of the States, *three fourths* of each House is required. The new constitution of Maine has a provision, with which I should be content; which is, that no udge shall be liable to be removed by the Legislature till the matter of his accusation has been made known to him, and he has had an opportunity of being heard in his defence."

He says that the Constitution gives you the power to remove, and all he asks is, that before doing it, you should allow the Judge an opportunity to be heard.

The fact is, gentlemen, you have, according to Mr. Webster, the power to shut that door, and, without assigning any reason whatever, vote a Judge out of office, and send him word that he is out — the Constitution does not guarantee him any thing else than that. Webster wanted it

amended; the Convention submitted a proposition for amendment; but the people declined to accept it. This absolute sovereignty of Massachusetts, which, ever since the colonies, had been held on to by the people, of that they were unwilling to yield a whit.

The debate continues, and Mr. CHILDS again joins in it: —

"The object in giving the power to the Legislature was, that judges might be removed when it was the *universal sentiment of the community that they were disqualified for the office*, although they could not be convicted on impeachment."

Can you ask any thing more definite than that? Nobody denied it. "The object in giving this power to the Legislature was, that Judges might be removed, when it was the universal sentiment of the community that they were disqualified for the office, although they could not be convicted on impeachment."

Gentlemen, I would not weary your patience with long extracts; I am giving you only the general current of the discussion. The next speaker is JAMES TRECOTHICK AUSTIN, — the name of one who will not be suspected of being too favorable to the rights of the people; it is not often that I have an opportunity to quote him on my side. "Nobody objects to this provision," said Mr. Austin. There sat Prescott, Shaw, Webster, Story, Lincoln, — the men whom you look up to as the lights of this Commonwealth; but — "nobody objects to this provision!"

"Nobody objects to this provision. The House of Representatives is the grand inquest — they are tried by the Senate, and have the right of being heard. But the Constitution admits that there may be cases in which judges may be removed without supposing a crime. But how is it to be done by this resolution? — there are to be two trials, when for the greater charge of a high crime he has only one. It so obstructs the course of proceeding, that it will never be used. He would suppose the case, not of mental disability — *but the loss of public confidence.* He knew that such cases were not to be anticipated. But he would look to times when the principle might be brought into operation — when the judge, by indulging strong party feelings, or from any other cause, should so far have *lost the confidence of the community that his usefulness should be destroyed. He ought in such cases to be removed; but if witnesses were to be summoned to prove specific charges, it would be impossible to remove him. A man may do a vast deal of mischief and yet evade the penalty of the law — a judge may act in such a manner that an intelligent community may think their rights in danger, and yet commit no offence against any written or unwritten law.* Men are more likely to act in such manner as to render themselves unworthy to be trusted than so as to subject themselves to trial. The great argument for the amendment is, that it is necessary to secure the independence of the judiciary. He was in favor of the principle, but it had its limitations. While we secure the independence of the judges, we should remember that they are but men, and sometimes mere partisans."

The remonstrant here says,—I have not touched a statute. Mr. Austin says,—No matter whether you have or not—"a man may do a vast deal of mischief, and yet evade the penalty of a law." Then he says he has heard a great deal of the weakness of the Judiciary. He says the Judiciary is not weak. Should you chance to see the remonstrant appear here attended by eminent legal relatives and friends, you will remember this:—

"The Court were besides attended by a splendid and powerful retinue—the bar. They have great influence from their talents, learning, and *esprit du corps*, and as an appendage to the Court, they give them a great and able support. He did not admit that the judiciary was a weak branch of the government, but on the contrary, it was a strong branch."

Then comes Judge STORY. If any body ever was, I may say, a little crazy on the subject of the independence of the Judges, it was the late able and learned Judge Story—at least, during the last half of his life. What does he say? He says:—

"The Governor and Council might remove them (Judges) on the address of a majority of the Legislature, not for crimes and misdemeanors, for that was provided for in another manner, but for no cause whatever—no reason was to be given. A powerful individual, who has a cause in Court which he is unwilling to trust to an upright judge, may, if he has influence enough to excite a momentary prejudice, and command a majority of the Legislature, obtain his removal. He does not hold the office by the tenure of good behavior, but at the will of a majority of the Legislature, and they are not bound to assign any reason for the exercise of their power. *Sic volo, sic jubeo, stet pro ratione voluntas.* (Thus I wish it; thus I order; let my will stand for a reason.) This is the provision of the Constitution, and it is only guarded by the good sense of the people. He had no fear of the voice of the people, when he could get their deliberate voice—but he did fear from the Legislature, if the judge has no right to be heard."

That is the opinion of the learned Judge Story as to the power of the Legislature. "I have no fear of the voice of the people," says Judge Story. All he proposed was, that the Judge should have an opportunity to be heard. Then he states, with that exceeding simplicity for which the good Judge was remarkable, that "for forty years past it had so happened that the Judges had, except for a few years, always agreed with the party in power"!!!

What was the result of this discussion? The Convention proposed to the people—what? That no Judge should ever be removed without notice. The people voted on that amendment, voted NAY, and declined to insert it in the Constitution.

Now, gentlemen, what is my argument? Here is a debate on this clause, not by men heated with passion, not by men with party purposes to serve, but by men acting as statesmen, in the coolest, most deliberate and temperate mood — men of various parties, Whig and Democratic — and every one of them asserts, without a dissenting voice, that this provision is inserted for the purpose of giving the Legislature the power to remove a Judge, when he has not violated any law of the Commonwealth. In addition to this, gentlemen, I will read the remark of Chief Justice Shaw, when he was counsel for the House against Judge Prescott, of Groton, who was removed on impeachment, you will recollect, in 1821. On that occasion, Judge Shaw was counsel for the House of Representatives, and made some comments on this provision, which, as his opinion has a deserved weight in matters of constitutional law, it is well to read here. He says: —

"It is true, that by another course of proceeding, warranted by a different provision of the Constitution, any officer may be removed by the Executive, at the will and pleasure of a bare majority of the Legislature; a will, which the Executive in most cases would have little power and inclination to resist. The Legislature, without either allegation or proof, has but to pronounce the *sic volo, sic jubeo*, and the officer is at once deprived of his place, and of all the rank, the powers and emoluments belonging to it. And yet, perhaps, this provision, (whether wise or not, I will not now stop to consider,) is hardly sufficient to justify the extraordinary alarm which has been so eloquently expressed for the liberty and security of the people, or to affix upon the Constitution the charge of containing features more odious and oppressive than those of Turkish despotism. The truth is, that the security of our rights depends rather upon the general tenor and character, than upon particular provisions of our Constitution. The love of freedom and of justice — so deeply engraven upon the hearts of the people, and interwoven in the whole texture of our social institutions — a thorough and intelligent acquaintance with their rights — and a firm determination to maintain them — in short, those moral and intellectual qualities, without which, social liberty cannot exist, and over which despotism can obtain no control — these stamp the character and give security to the rights of the free people of this Commonwealth. So long as such a character is maintained, no danger perhaps need be apprehended from the arbitrary course of proceeding, under the provision of the Constitution, to which I have alluded. But, Sir, we have never for a moment imagined, that the proceedings on this impeachment could be influenced or affected by that provision. The two modes of proceeding are altogether distinct, and in my humble apprehension, were designed to effect totally distinct objects. No, Sir; had the House of Representatives expected to attain their object, by any means short of the allegation, proof and conviction of criminal misconduct, an address and not an impeachment would have been the course of proceeding adopted by them."

These well-considered and weighty sentences of Chief Justice Shaw show his idea of the extent of your power, and will relieve your minds of any undue apprehension as to the danger of its exercise.

The people of Massachusetts have always chosen to keep their Judges, in some measure, dependent on the popular will. It is a colonial trait, and the sovereign State has preserved it. Under the King, though he appointed the Judges, the people jealously preserved their hold on the Bench, by keeping the salaries year by year dependent on the vote of the popular branch of the Legislature. This control was often exercised. When Judge Oliver took pay of the King, they impeached him. (See Washburn's Judicial History of Massachusetts, 139, 160.) When the Constitution was framed, the people chose to keep the same sovereignty in their own hands. Independence of Judges, therefore, in Massachusetts, gentlemen, means, in the words of Mr. Childs, "the fullest independence consistent *with their responsibility.*"

The opinions I have read you derive additional weight from the fact, that all the speakers were aware of the grave nature of this power, and some painted in glowing colors how liable to abuse it was. Still, not one proposed to take it from you. The most anxious only asked to check it by requiring a two-thirds vote. This proposition the Convention refused to accept; the utmost the Convention would recommend to the people was, that the Judge should have notice and liberty to defend himself. Even this limitation on your power, the people refused to adopt. They were fully warned, and deliberately, on mature reflection, decided that it was safe and wise to entrust you with *unlimited discretion* in this respect. With such a page in our history, it is not competent for the press or the friends of Judge Loring to argue that no such power ought to have been given you, and that it is too dangerous to be used. The people alone have the right to decide that question, and *they have decided it.* When, after full deliberation, they gave you the power, they said, in effect, that occasions might arise requiring its exercise, and on such fitting occasions, they wished it exercised. Doubtless, gentlemen, this is a grave power, and one to be used only on important occasions. We are bound to show you, not light and trifling reasons for the removal of Judge Loring, but such grave and serious reasons, such weighty cause, as will justify your interference, and make this use of your authority strengthen rather than weaken the proper independence of the Bench.

Indeed, the power is in itself a wise, good, and necessary one, and should be lodged somewhere in every government. The Boston papers, in all their arguments on this point, take it for granted that the People are to be always under guardianship — that Government is a grand Probate Court to prevent the People — the insane and always under-age

People — from wasting their own property and cutting their own throat. Not such is the theory of Republican Institutions. The true theory is, that the People came of age on the 4th day of July, 1776, and *can be trusted* to manage their own affairs. The People, with their practical common sense, instinctive feeling of right and wrong, and manly love of fair play, are the true conservative element in a just government. It is true, the People are not always right; but it is true also, that the People are not often wrong — less often, surely, than their leaders. The theory of our government is, that the purity of the Bench is a matter which concerns every individual. Whenever, therefore, guilt, recklessness or incapacity, shield themselves on the Bench, by technical shifts and evasions, against direct collision with the law, it is meant that the reserved power of the People shall intervene, and save the State from harm.

It is easy to conceive many occasions for the exercise of such a power. How many men among us, by gross misconduct in Railroad or Banking Companies, have incurred the gravest disapprobation, and yet avoided legal conviction? Suppose such men had been at the same time Judges — will any one say they should have been continued on the Bench? Yet, on the remonstrant's theory, it would be an "abuse of power" to impeach or "address" them off of the Bench! Suppose a Judge by great private immorality incurs utter contempt — is drunk every day in the week except Probate Court day — shall he, because he is cunning enough to evade statutes, still hide himself under the ermine? Suppose a Judge of Probate should open his Court on the days prescribed by the statute, and close it in half an hour, as your Judge Loring did when he shut up the Probate Court of Suffolk on Monday, the 29th of May, to hurry forward the kidnapping of Anthony Burns. Suppose some Judge should thus keep his Court open only five minutes each Probate day the whole year through. He violates no statute, though he puts a stop to all business; yet, according to the arguments of the press and the remonstrant, it would be a *gross abuse of power* to impeach him, or address the Governor for his removal, since he has violated no law!

Not such was the good old doctrine. In the Prescott case, Judge Shaw went so far as to contend that a Judge might not only be removed by address, but *impeached* "for misconduct and mal-administration in office, . . . of such a nature that the ordinary tribunals would not take notice of or punish them, in their usual course of proceedings, and according to the laws of the land, and for which, therefore, the offender would not be indictable." (*Prescott's case*, p. 180.)

You may think, gentlemen, that I have occupied too much time in

proving the unlimited extent of your power. But it seemed necessary, since the press which defends the remonstrant, and he also, though they do not in words deny your unlimited authority, do so in effect. They claim that you destroy the independence of the Bench, and *abuse* your power, if you exercise it in any case but a clear violation of law. This is a practical annihilation of the power. This claim loses sight of the very nature and intent of the power, which is well stated by Mr. Austin, when he says that a Judge who has lost the confidence of the community ought to be removed, though you can prove no specific charges against him, — though he may have violated no law, written or unwritten. Or, in words said to have been used by Mr. Rufus Choate in a recent case, "A judicial officer may be removed if found intellectually incapable, or if he has been left to commit some great enormity, so as to show himself morally deranged."

This unlimited power, then, gentlemen, is one that you undoubtedly possess. It is one that the people deliberately planned and intended that you should possess. It is one which the nature of the government makes it necessary you should possess, and that, on fitting occasion, you should have the courage to use. True, it is a grave power. But what is all government but the exercise of grave powers? "When the sea is calm, all boats alike show mastership in floating." The merit of a government is, that it helps us in critical times. All the checks and ingenuity of our institutions are arranged to secure for us in these Halls men wise and able enough to be trusted with grave powers, and bold enough to use them when the times require. Let not, then, this bugbear of the liability of this power to abuse deter you from using it at all. Lancets and knives are dangerous instruments. The usefulness of surgeons is, that when lancets are *needed*, somebody may know how to use them and save life.

Has, then, a proper case occurred for the exercise of this power? In other words, ought you now to exercise it? The petitioners think you ought, and for the following reasons: —

First. When Judge Loring issued his warrant in the Burns case, he acted in defiance of the solemn convictions and settled purpose of Massachusetts — convictions and purpose officially made known to him, with all the solemnity of a statute.

In order to do him the fullest justice on this point, allow me to read a sentence from his remonstrance: —

"And I respectfully submit, that when, (while acting as a Commissioner,) I received my commission as Judge of Probate, no objection

was made by the Executive of the Commonwealth or of any other branch of the government, to my further discharge of the duties of a Commissioner; nor at the passage of the act of 1850, when the jurisdiction aforesaid was given to the Commissioners of the Circuit Courts of the United States, nor at any time since, was I notified, that the government of Massachusetts, or either the Executive or Legislative branch thereof, regarded the two offices as incompatible, or were of opinion that the same qualities and experience which were employed for the rights and interests of our own citizens, should not be employed for the protection of all legal rights of alleged fugitives from service or labor under the United States act of 1850.

"I make these latter remarks only for the purpose of bringing respectfully to the notice and clear apprehension of your honorable bodies, the extreme injustice and want of equity that would be involved in the removal of a Judge from office, for the past discharge of other official duties, not by law made incompatible with his duties as Judge; against his exercise of which no official objection had ever been raised; and which were created and imposed on him by that law of the land which is the supreme law of Massachusetts."

Gentlemen, this is a mere evasion. He was made Judge of Probate in 1847. He then knew, as well as you and I do, that Massachusetts *did* regard the conduct of any one of her magistrates in aiding in the return of a fugitive slave as something disgraceful and infamous. He had solemn and *official* intimation of this. My proof is the statute of March 24, 1843, entitled, "An Act further to protect personal liberty":

"SECT. 1. *No Judge of any Court of Record of this Commonwealth*, and no justice of the peace, shall hereafter take cognizance or grant a certificate in cases that may arise under the third section of an act of Congress, passed February twelfth, seventeen hundred and ninety-three, and entitled, 'An Act respecting fugitives from justice, and persons escaping from the service of their masters,' to any person who claims any other person as a fugitive slave within the jurisdiction of the Commonwealth.

"SECT. 2. No sheriff, deputy sheriff, coroner, constable, jailor, *or other officer of this Commonwealth*, shall hereafter arrest or detain, or aid in the arrest or detention or imprisonment in any jail or other building belonging to this Commonwealth, or to any county, city or town thereof, of any person, for the reason that he is claimed as a fugitive slave.

"SECT. 3. Any justice of the peace, sheriff, deputy sheriff, coroner, constable, or jailor, who shall offend against the provisions of this law, by in any way acting, directly or indirectly, under the power conferred by the third section of the act of Congress aforementioned, shall forfeit a sum not exceeding one thousand dollars for every such offence, to the use of the county where said offence is committed, or shall be subject to imprisonment not exceeding one year in the county jail." [*Approved, March* 24, 1843.]

The intent of that statute is clear and unmistakable. It expresses the determined will of the Commonwealth, that no magistrate of hers shall accept from the United States any authority, or take any part, directly or indirectly, in returning fugitive slaves to their masters. It means to

set a stigma on slave-catching in this Commonwealth. It thunders forth its command, that no officer shall hold the broad seal of the State in one hand, and reach forth the other for a slave-catcher's fee. This is the heart and gist of the statute. He that runneth may read.

Technically construed, it may be said only to forbid that a Judge, *acting as a Judge*, should issue a slave warrant; and it may be claimed that Mr. Loring did not transgress it, since he issued his warrant, not *as a Judge*, but as a Slave Commissioner. Technically speaking, this may be so, and an inferior Court of Justice would be bound so to regard it. But you are not sitting as *nisi prius* lawyers, bound by quiddling technicalities; you are statesmen, looking with plain, manly sense at the essence of things. Have you any doubt what Massachusetts intended when she enacted that statute? Have you any doubt that Mr. Loring knew what Massachusetts meant? Why does the Constitution give you this power of removing Judges by address? To meet just such cases as this; when some individual has violated the spirit and essence of a law, but cannot be technically held by impeachments. Remember what Mr. Austin says, describing just the case in the extract I have twice quoted from his speech in the Convention. If you allow yourselves to be diverted from the exercise of the power by such technicalities, you forget the very purpose for which it was given, and practically annihilate it.

It is not true, then, as Mr. Loring claims, that when he received his commission, "no objection was made by the Executive of the Commonwealth, or of any other branch of the government, to his further discharge of the duties of a commissioner"—meaning the duty of catching slaves. The statute of 1843, then in full force and effect, was clear and official notice to him what "objection" the Commonwealth had to the returning of slaves.

But it is said the statute was passed in 1843, and only prohibited officers from acting under the slave act of 1793; it cannot have any reference to the slave act of 1850, since this was not in existence in 1843, and Mr. Loring's action in the Burns case was under the act of 1850.

This is another technical evasion, but not as good even as the first; because, in the Sims case, (7 Cushing, 285,) which Mr. Loring cites, Judge Shaw holds the act of 1850 constitutional, because it is so *precisely* like the act of 1793; and Mr. Loring, in his Burns judgment, takes the same view. Now, if the two acts are so precisely alike that the constitutionality of one proves the constitutionality of the other, then they are such twins as to be both within the meaning and intent of our statute of 1843.

When the counsel of Sims and Burns wished to argue the unconstitutionality of the act of 1850, on the ground that it went far beyond any thing judicially recognized in the act of 1793, then Judges Shaw and Loring find the two acts so much alike that the argument is unnecessary. When Mr. Loring's friends would defend him, then these two acts are so different, that our law of 1843 can apply only to the first! To plunge an innocent and free man like Burns into slavery, against law and evidence, these statutes are just alike: to save Judge Loring from the act of 1843, they are different as white and black! (See *Note A.*)

But even this technicality is of no avail. The *official* action of the State has for ever closed this door of escape.

While Congress was discussing the Fugitive Slave Bill, which was finally passed Sept. 18, 1850, our Legislature passed the following resolutions, which the Governor approved, May 1, 1850:—

Resolved, That the sentiments of the people of Massachusetts, as expressed in their legal enactments, in relation to the delivering up of fugitive slaves, remain unchanged; and inasmuch as the legislation necessary to give effect to the clause of the Constitution, relative to this subject, is within the exclusive jurisdiction of Congress, we hold it to be the duty of that body to pass such laws only, in regard thereto, as will be sustained by the public sentiment of the free States, where such laws are to be enforced, and which shall especially secure to all persons whose surrender may be claimed as having escaped from labor and service in other States, the right of having the validity of such claim determined by a jury in the State where such claim is made.

Resolved, That the people of Massachusetts, in the maintenance of these their well-known and invincible principles, expect that all their officers and representatives will adhere to them at all times, on all occasions, and under all circumstances. [*Approved, May* 1, 1850.]

Observe, the Commonwealth reäffirms the principle of her former *legal enactments* — that is, the act of 1843; and expects all her "officers to adhere to them *at all times, on all occasions, and under all circumstances.*"

What shall we say now to Mr. Loring's claim, that neither when he received the commission as Judge of Probate, nor at any time since, was he notified "by the government of Massachusetts, or by the Executive or Legislative branch thereof," that slave-catching and bearing office under Massachusetts were incompatible! Are not these Resolutions substantially a reënactment of the statute of 1843, distinctly applying to the Fugitive Slave Bill of 1850, and officially warning all officers that the State expected them to abstain from taking part in the execution of that act, as much as of the act of 1793?

Look at the case, gentlemen. A sovereign State issues her mandate,

that no magistrate of her's shall aid in catching slaves. Seven years later, she solemnly reiterates the order, and directs her officers to remember it on all occasions. In open, contemptuous defiance of all this, one of her Judges adjourns his own Court, to hold one that dooms a man to bondage. The Legislature meet and talk of removing him. But the Judge, in a tone of indignant innocence, exclaims — "What! turn me out for a mere difference of opinion! Have I not evaded the law? If you remove such an innocent and law-abiding Judge as I am, you will destroy the independence of the Bench!" Yes, truly; that sort of independence that consists in defying the State in order to serve a party, or minister to the ambition of friends.

Some men allege that the same reasoning would condemn Judge Shaw for refusing to set Sims free, by *habeas corpus*, from the grasp of the claimant. But surely, he must be stone blind, who sees no difference between a Judge, like Shaw, who, thinking he has no power to arrest the Slave Act when once set in motion, refuses to interfere, and a Judge, like Loring, who actually sets the Slave Act in motion, and personally executes it! The statute of 1843 only orders our officers not to aid in catching slaves. It does not order them to prevent every body else from catching slaves. Loring actually hunted a slave, and sent him to Virginia. Shaw only declared himself unauthorized to prevent George T. Curtis from hunting fugitive slaves. Surely, there is some slight difference here.

In consenting, then, to act as a Slave Commissioner, while holding the office of a Probate Judge, Mr. Loring defied the well-known, settled, religious convictions of the State, *officially* made known to him. The question was one of vital, practical morality of the gravest importance; one where justice was on one side and infamy on the other. He can not complain if you consider this heedless or heartless choice of the infamous side, this open defiance, on so momentous a matter, sufficient cause for his removal.

My second reason is, that the very method of the trial of Anthony Burns shows Mr. Loring unfit to be continued longer on the Bench. I am not now dealing with the point that he *did* act; I have said that his mere acting in the case was a defiance of the Commonwealth; — but I now say, that the *manner* of his acting is another ground for which he ought to be removed, and shows him to be unfit for the office of a Judge.

Anthony Burns was arrested at eight o'clock on Wednesday evening. He was hurried to the Court House, and concealed there within four

walls. He was not allowed to see any body but the slave claimant, the Marshal, and the Police. At nine o'clock on Thursday morning, our Judge of Probate, Mr. Edward G. Loring, the Slave Commissioner, appeared in his court-room, with the slave-claimant and his witnesses, the alleged fugitive, the Marshal and the police. He proceeded to trial. Trembling, ignorant, confused, astounded, friendless, not knowing what to say or where to look, that unhappy man, Burns, sat, handcuffed, with a policeman on each side. The Commissioner proceeded to try him. By accident, Mr. Richard H. Dana, Jr., had heard that such a trial was to be held, and had reached the court-room. By accident, another learned counsel, who sits by my side, (Charles M. Ellis, Esq.,) heard that such a scene was enacting, and hurried to the Court-House. I heard of it in the street, Mr. Theodore Parker was notified, and we went to the court-room. We found Robert Morris, Esq., already there. Mr. Morris, a member of the bar, had attempted to speak to Burns — the policemen forbade him. The melancholy farce had proceeded for about half an hour. In two hours more, so far as any one could then see, the judgment would have been given, the certificate signed, the victim beyond our reach. There sat the Judge of Probate, clothed with the ermine of Massachusetts; before him cowered the helpless object of cruel legislation, and the crushed victim of an inhuman system. Mr. Dana had moved the Court before to defer the trial; but the Commissioner proceeded to examine the witness. After a short time, Mr. Dana rose, — (he had no right to rise, technically speaking, — he rose as a citizen merely, not as counsel,) — and I read you what he said: —

"May it please your Honor: — I rise to address the Court as *amicus curiæ*, for I cannot say that I am regularly of counsel for the person at the bar. Indeed, from the few words I have been enabled to hold with him, and from what I can learn from others who have talked with him, I am satisfied that he is not in a condition to determine whether he will have counsel or not, or whether or not and how he shall appear for his defence. He declines to say whether any one shall appear for him, or whether he will defend or not.

"Under these circumstances, I submit to your Honor's judgment, that time should be allowed to the prisoner to recover himself from the stupefaction of his sudden arrest, and his novel and distressing situation, and have opportunity to consult with friends and members of the bar, and determine what course he will pursue." * * * * *

"He does not know what he is saying. I say to your Honor, as a member of the bar, on my personal responsibility, that from what I have seen of the man and what I have learnt from others who have seen him, that he is not in a fit state to decide for himself what he will do. He has just been arrested and brought into this scene, with this immense stake of freedom or

slavery for life at issue, surrounded by strangers — and even if he should plead guilty to the claim, the Court ought not to receive the plea under such circumstances.

"It is but yesterday that the Court at the other end of the building refused to receive a plea of guilty from a prisoner. The Court never will receive this plea in a capital case, without the fullest proof that the prisoner makes it deliberately, and understands its meaning and his own situation, and has consulted with his friends. In a case involving freedom or slavery for life, this Court will not do less." * * * * * * *

"I know enough of this tribunal to know that it will not lend itself to the hurrying off a man into slavery to accommodate any man's personal convenience, before he has even time to recover his stupified faculties, and say whether he has a defence or not. Even without a suggestion from an *amicus curiæ*, the Court would, of its own motion, see to it that no such advantage was taken.

"The counsel for the claimant says that if the man were out of his mind, he would not object. Out of his mind! Please your Honor, if you had ever reason to fear that a prisoner was not in full possession of his mind, you would fear it in such a case as this. But I have said enough. I am confident your Honor will not decide so momentous an issue against a man without counsel and without opportunity." * * * *

Again, in his argument, alluding to the same scene, Mr. Dana says:

"Burns was arrested suddenly, on a false pretence, coming home at nightfall from his day's work, and hurried into custody, among strange men, in a strange place, and suddenly, whether claimed rightfully or claimed wrongfully, he saw he was claimed as a slave, and his condition burst upon him in a flood of terror. This was at night. You saw him, sir, the next day, and you remember the state he was then in. You remember his stupified and terrified condition. You remember his hesitation, his timid glance about the room, even when looking in the mild face of justice. How little your kind words reassured him. Sir, the day after the arrest, you felt obliged to put off his trial two days, because he was not in a condition to know or decide what he would do."

Mr. Ellis rose also, and protested against the trial. Gentlemen, what a scene! A man clothed in the ermine of Massachusetts has before him a helpless man, — in the words of Mr. Dana, "terrified, stupified, intimidated,"—and begins to try him. If the Chief Justice of the Commonwealth should find the veriest vagrant from the streets indicted for murder by twenty three jurors, and solemnly and legally set before him, he would not take upon himself to proceed to trial without the man had counsel — every lawyer knows this. And yet this man, who ought to have shown the discretion and humanity of a Judge, was proceeding in a trial so enormous and fearful, that counsel coming in by accident felt urged to rise in their places and interrupt him, protesting, as citizens of Massachusetts, that this mockery of justice should not go on. You have a Judge of Probate that needs to have accident fill his court-room with honest men, to call him back to his duty. The petitioners say that such

a man is not fit to sit upon the Bench of Massachusetts. Do we exaggerate the importance of the occasion? Let me read a single sentence from Dr. Channing: —

"This Constitution was not established to send back slaves to chains. The article requiring this act of the free States was forced on them by the circumstances of the times, and submitted to as a hard necessity. It did not enter into the essence of the instrument; whilst the security of freedom was its great, living, all-pervading idea. We see the tendency of slavery to warp the Constitution to its purposes, in the law for restoring the flying bondman. Under this, not a few, having not only the same natural but legal rights with ourselves, have been subjected to the lash of the overseer.

"But a higher law than the Constitution protests against the act of Congress on this point. According to the law of nature, no greater crime against a human being can be committed, than to make him a slave. * * * *

"To condemn a man to perpetual slavery is as solemn a sentence as to condemn him to death. Before being thus doomed, he has a right to all the means of defence which are granted to a man who is tried for his life. All the rules, forms, solemnities, by which innocence is secured from being confounded with guilt, he has a right to demand. In the present case, the principle is eminently applicable, that many guilty should escape, rather than that one innocent man should suffer; because the guilt of running away from an 'owner' is of too faint a color to be seen by some of the best eyes, whilst that of enslaving the free is of the darkest hue."

Dr. Channing would have all the forms and solemnities of justice, usual in cases where life hangs on the issue, rigidly observed, when a slave case is to be determined. Your Judge of Probate arrests a man at night; no one knows of it; at the earliest hour in the morning that a Court ever sits, he opens his Court; this poor, trembling, friendless victim, who hardly dared to look up and meet his eye, is brought before him, and he proceeds to try him. Strangers come in and say, he is too stupified to be tried. Still the Judge goes on, and they sit awhile, their blood boiling within them, till they feel compelled to rise, and solemnly protest against this insult to all the forms of justice; and the Court, after the repeated protests of two members of the bar, at length consents to put off that trial, allow the unhappy man to recover himself, consult with friends, and decide what course to pursue.

Why, gentlemen, if a man has committed murder, and has been indicted by a jury, the statute provides that he shall have time allowed him to prepare for his defence, have a copy of his indictment, and a list of the witnesses against him, and when it is all done, the Supreme Court would not touch the case until they had assigned him counsel. They would fear to draggle their ermine in blood. But here is a Massachu-

setts Judge of Probate with whom it is but the accident of an accident, but the impudence of counsel, so to speak, that prevents such an outrage as Mr. Dana's protest describes. Now, your petitioners ask, in the name of Massachusetts, for a Judge who can be safely trusted in a private chamber with an innocent man.

I recal the scene in that court-room, while our hope that the Judge would postpone that case hung trembling in the balance. We were none of us sure that even the indignant, unintermitted protests of these members of the bar would secure the postponement of that trial. Think of the difference in this case! You are trying Mr. Loring for continuance in his office. He comes here with all the advantages of education, wealth, social position, professional discipline, every thing on his side, and can choose when he will be tried. Around him are troops of friends. Influential journals defend his rights. But that poor victim — what a contrast! According to Dr. Channing, it was as much as life that hung in the balance. The old English law says that the Judge is counsel for the prisoners. There were no such promptings here as led the Judge to say, "I shall not try that man unless he has counsel, and all the safeguards and checks of a judicial examination." The hapless victim, too ignorant, at the best, to know his own rights or how to defend them, was then stunned by the overwhelming blow — by the arrest, and the sight of the horrible pit into which he was to be plunged. Over his prostrate body, this Massachusetts Judge of the fatherless and widow opens his Court, and begins to hold the mockery of a trial! If you continue him in office, you should appoint some one, — some "flapper," as Dean Swift says, — some humane man, to wait upon his Court, and for the honor of the State, remind him when it will be but decent to remember justice and mercy, for he is not fit to go alone.

Do you ask us what course Mr. Loring should have adopted? We answer, the same course that any merely decent Judge would adopt in such a case. Here was a man arrested some twelve hours before on a false pretence, and kept shut up from all his friends. All this Mr. Loring knew, or was bound to know, since such has been the constant practice in all slave cases, here and elsewhere. The first duty of a just Judge was to tell the man, truly and plainly, what he was arrested for — see that his friends had free access to him, and fix some future day to commence his trial, leaving time sufficient to consult and prepare a defence. This is what the statutes of any civilized state ordain, in cases where even ten dollars are in dispute. The first word that William Brent, the witness, was allowed to speak on the stand in such circumstances, was

the death-knell to any claim Mr. Loring might have to be thought a humane man, a good lawyer, or a just Judge. A statute which the whole civilized world regards as the most infamous on record, is executed by men who claim to be lawyers, Judges and Christians, with a violence and haste which doubles its mischief. These Slave Commissioners, while constantly prating of the "painful duty" their allegiance to law entails on them, contrive to add by their haste to the brutality and cruelty even of the Slave Act. Knowing the cruel nature of the statute he was executing, and the routine of lies and close confinement always found in slave cases, Mr. Loring's first duty, after his Court was open, was to adjourn it for three days, at least, taking measures that Burns should meantime see friends and counsel, to consult on his defence. All Mr. Loring's friends can say for him is, that he was only acting as all other Slave Commissioners act, and that no harm was done, since the Abolitionists came in and secured Burns a trial! As if the infamous slave-prisons of Curtis and Ingraham were precedents for any Court to follow! As if any man was proved fit to be a Judge by alleging that strangers prevented his doing all the mischief he intended!

The case was adjourned to Saturday.

Where do we next meet this specimen of Massachusetts humanity and judicial decorum?

On Friday, the United States Marshal refused me admission to the prisoner, and I went to Mr. Loring at Cambridge, where he was Law Lecturer at Harvard College, and asked him for an order directing the Marshal to allow me to see the prisoner. He sits down and writes a letter, authorizing me to cross that barrier and see Burns; and as he hands it to me, he says—"Mr. Phillips, the case is so clear, that I do not think you will be justified in placing any obstacles in the way of this man's going back, AS HE PROBABLY WILL"!! What right had he to think Burns would go back? He had heard only one witness; yet he says, "*The case is so clear, that I do not think you will be justified in placing any obstacles in the way of this man's going back*, AS HE PROBABLY WILL"!!!

Suppose, Mr. Chairman, that, in the case of Dr. Webster, after he had been indicted, but before he had been put on trial, the Chief Justice of the Commonwealth had said to Mr. Sohier, or any other of his counsel—"Sir, I do not think you will be justified in placing any obstacles in the way of this man's being hung, *as he probably will!*" What would be thought of the Judge who should proceed to try a man for his life, after expressing such an opinion on the case to be brought before him?

Yet, such was the mood of mind of this Judge of Probate, that, without hearing argument or testimony — only the disjointed story of a single witness, interrupted by the protests of Messrs. Dana and Ellis, — the mere *disjecta membra* of a trial, — nothing, — he had so far made up his mind, that he could warn me from attempting to do any thing to save the man from the doom to which he was devoted, on the ground of the probability of his being given up! "A Judge who proceeds on half evidence will not do quarter justice," says an old English essayist. What proportion, then, of justice, may we expect from a Judge who decides on no evidence at all?

I ask (I was going to say) the Judges of the Commonwealth of Massachusetts, — men of fair fame and judicial reputation, — whether a person of that temper of mind is fit to sit by their side? I ask any man who loves the honor of the Bench, who desires to see none but high-minded, conscientious, humane, just Judges, whether the petitioners who ask for the removal of such an individual, are attacking or supporting the honor of the Bench of Massachusetts; its real strength and independence? It seems to me that we are cutting off a corrupt member, and securing for the rest the only source of strength, the confidence of the Commonwealth. The Bench is not weakened when we remove a bad Judge, but when we retain him.

Gentlemen, it is not in the power of this Legislature, respectfully be it said, it is not in the power of this Legislature, to command the respect of this Commonwealth for a Bench on which sits Edward Greely Loring. You may refuse to remove him; but you cannot make the people respect a Bench upon which he sits. If any man here loves the Judiciary, and wishes to secure its independence and its influence with the people, let him aid us to cut off the offending member.

Thirdly. Gentlemen, where is your Judge next heard of? He is next heard of at midnight, on Saturday, 27th of May, drawing up a bill of sale of Anthony Burns, which now exists in his own hand-writing! Before the trial was begun, he sits down and writes a bill of sale: —

"Know all men in these presents — That I, Charles F. Suttle, of Alexandria, in Virginia, in consideration of twelve hundred dollars, to me paid, do hereby release and discharge, quitclaim and convey to Antony Byrnes, his liberty; and I hereby manumit and release him from all claims and services to me forever, hereby giving him his liberty to all intents and effects forever.

"In testimony whereof, I have hereto set my hand and seal, this twenty-seventh day of May, in the year of our Lord eighteen hundred and fifty-four."

Gentlemen, suppose, while Dr. Webster sat in the dock, before the trial commenced, Chief Justice Shaw had summoned Mrs. Webster to his side, and said, "I advise you to get a petition to the Governor to have your husband pardoned; I think he will be found guilty"! Why, he would have been scouted from one end of the Commonwealth to the other. Suppose a deed of land was in dispute, and before the case began, the Judge should call one of the claimants before him and say, "I advise you to compromise this matter, for I think your deed is not worth a straw!" Who would trust his case to such a Judge? But here is a man put before a Judge to be tried on an issue which Dr. Channing says is as solemn as that of life or death, and the Judge is found at midnight, with the pregnant intimation that that man must be bought, or he is not safe! What right had he to say that? Mr. Chairman, the case may have been so clear even then, before it was half begun, that every man in the Commonwealth, save one, would have been obliged to say that Burns was a fugitive; but there was one pair of lips that honor and official propriety ought to have sealed, and those were the lips of the Judge who was trying the case. Yet, he is the very man who is found babbling! He seemed to be utterly lost to all the proprieties of his position. Col. Suttle selling Burns on the 27th of May! What even legal right in Burns had Col. Suttle then to convey? None. No law knew of any. Yet the very Judge trying the case, volunteers to suppose a title based on his own decision, which ought then to have been unknown, even to himself. Suffolk Court-House is turned into a Slave-Auction Block; and the Slave Commissioner, the trial hardly commenced, jumps upon the stand, — not needing to lay aside whatever judicial robes a Slave Commissioner may be supposed to wear!

Fourthly. The Commissioner knew how general was the opinion among lawyers, that a writ of replevin might be served after his judgment and before the affidavit of the claimant was made. He knew the anxiety of the friends of Burns to test the possibility of thus legally securing his release by Massachusetts law. But in the Commissioner's hot haste and obstinate determination to have every law except those of this Commonwealth obeyed to the letter, he arranged and conspired with Col. Suttle and the United States Marshal to have all the papers executed in such secrecy and so exactly at the same moment, as to deprive Burns of all chance from this measure. How eminently worthy such plotting as this of a Massachusetts Judge! — of

one who assures you that he has scrupulously obeyed the *laws of Massachusetts!*

Well, gentlemen, it is said,—I cannot state it on any thing but rumor,—that, as the crowning act of his unjudicial conduct, he communicated his decision to one party twenty hours before he communicated it to the other, so that Messrs. Smith, Hallett, Thomas, Suttle & Co., had time to send down into Dock Square and have bullets cast for the soldiers who were to be employed to assist the slave-hunter; had time to inform the newspapers in the city what they intended to do;—while Messrs. Dana and Ellis, counsel for the prisoner, were allowed to go to their homes in utter ignorance whether that decision would be one way or another. Where can you find, in the whole catalogue of judicial enormities, an instance when a Judge revealed his decision to one party, and concealed it from the other? If he thought it necessary, on any grounds of public security or from private reasons of propriety, to inform them what his decision was to be, he should have said,—"Gentlemen, I can meet you only in open Court, in the presence of counsel on both sides. I cannot speak to you, Mr. Thomas, unless Mr. Dana or Mr. Ellis is here. Call them, and then I will tell you what my decision is to be." At four o'clock on Thursday, the Commissioner made known his decision to the slave-claimant's counsel; on Friday, at nine o'clock, to Messrs. Dana and Ellis, and the world!!

What a picture! Put aside that it was a slave case; forget, if you will, for a moment, that he was committing an act which the Commonwealth says is *ipso facto* infamous, and declares that no man shall do it, and hold office. The old law of Scotland declared that a butcher should not sit upon a jury; he was incapacitated by his profession. The Commonwealth of Massachusetts, by the statute of 1843, says that any Slave Commissioner is unfit to sit upon the Bench. Mr. Loring cannot see it, although it was written and signed, reënacted and signed again,—although he was doing an act which the butchers of our city, to their honor be it said, would not sanction, two days afterwards. He puts this man into a room, bewildered, terrified, unfriended,—so unfit for trial, that strangers deem it their duty repeatedly to protest against the proceedings of the Court. Having gone through that mockery of half an hour's trial, he takes occasion to express his deliberate opinion of what the result is to be to counsel. Having done that, he makes his conduct still more flagrant by drawing up a bill of sale of the man who was still on trial before him. There was but one man in the State of Massachusetts who could not have drawn that bill of sale, as I before said; yet *he*

was the man to draw it! After that, he proceeds to collogue, to conspire, with one party, and tell them his decision, twenty hours before he informs the other. Gentlemen, I submit to you, as a citizen of Massachusetts, that this is conduct unfitting for the Bench; that there is, not to speak of inhumanity, an utter unfitness to try questions of any kind, an utter recklessness of judicial character and regard for propriety in such conduct, that might cause the very stones in the street to rise and plead for the majesty of the laws against such a Judge. The petitioners say to you, that such a man is not fit to wear the ermine of the Commonwealth of Massachusetts. Do they say too much? I am to die in this city; many of the petitioners are to die here. Our wills are to go into his hands. Our children and widows are to go before him. We cannot trust him; and we ask you to remove him, under that provision of the Constitution which gives you unlimited power to remove a Judge who is unfit for the duties of his office.

It is not necessary, Mr. Chairman, that I detain you long on the charge that Mr. Loring "wrested the law to the support of injustice, tortured evidence to help the strong against the weak, and administered a merciless statute in a merciless manner." You have in your hands the able arguments of Messrs. Ellis and Dana, as well as that remarkable "Decision which Judge Loring might have given," originally published in the *Boston Atlas*. These make it needless for me to enlarge on the law points. Allow me, however, a few brief statements.

1st. It has been well said, that "the statute leaves the party claimant his choice between two processes; one under its sixth section; the other under the tenth.

The sixth section obliges the claimant to prove three points; (1) that the person claimed *owes* service; (2) that he has *escaped;* and, (3) that the party before the Court is the *identical one* alleged to be a slave.

The tenth section makes the claimant's certificate *conclusive* as to the first two points, and only leaves the *identity to be proved.*

In this case, the claimant, by offering proof of service and escape, made his election of the sixth section.

Here he failed, failed to prove service, failed to prove escape. Then the Commissioner allowed him to swing round and take refuge in the tenth, leaving identity only to be proved; and this he proved by the prisoner's confession, made in terror, if at all; wholly denied by him, and proved only by the testimony of a witness of whom we know nothing, but that he was contradicted by several witnesses as to the only point to which he affirmed, capable of being tested."

2d. As to the point of identity. Col. Suttle proved that the person at the bar was his Anthony Burns by the testimony of one witness. Of this witness, it may be emphatically said, we knew nothing. He was never in the State before, and we hope he never will be again. He swore that Burns escaped from Richmond, March 24, 1854. To contradict him, six witnesses volunteered their testimony. They were not sought out; they came accidentally or otherwise into Court, and offered, unsolicited, their testimony, that they had seen the man at the bar in Boston for three or four weeks before the day of alleged escape. These were witnesses of whose daily life and unimpeached character ample evidence existed. Everybody knew them. Six to one! They were Boston mechanics and book-keepers; one a city policeman, one an officer in the regiment, and member of the Common Council. Surely, it was evident, either that the record was wrong, that the Virginia witness was wrong, or that this prisoner was not the man Col. Suttle claimed as his slave. Out of either door, there was chance for the Judge to find his way to release Burns. At any rate, there was reasonable doubt, and the person claimed was therefore entitled to his release. But no; Mr. Loring lets one unknown slave-hunter outweigh six well-known and honest men, tramples on the rule that in such cases all doubts are to be held in favor of the prisoner, and surrenders his victim to bondage.

Observe, gentlemen, in this connection, the exceeding importance of granting time to prepare for trial, the omission of which, on the part of Mr. Loring, I have commented on. If this case had been finished on Thursday, as it would have been but for the interference of others, these witnesses would not have been heard of till after Burns was out of the State. But after the two efforts of his counsel had succeeded in getting delay till Monday, the facts of the case became known through the city, and, having heard them, these witnesses volunteered their testimony. Now, if the ascertaining of pertinent facts be the purpose of a trial, which it surely is in all Courts, except those of Slave Commissioners, the consideration I have stated is a very important one. Though Mr. Loring chose to disregard this evidence, it was due to the law and to the satisfaction of the community, that, even in his Court, it should be heard.

3d. But as to the sole point to be proved, under the tenth section, identity, the evidence Mr. Loring relies on is the confession of the poor victim when first arrested. No confession is admissible when made in terror.

This confession was made at night — and even twelve hours after, Mr. Loring was forced himself to admit that the prisoner was so stupified and

terrified, he was in no fit state to be tried. Yet he admitted his confessions made in a still more terrified hour! The only witness, also, to this alleged confession, was this same unknown slave-hunter, unless we count one of the ruffians who guarded Burns.

But if the confession be taken at all, the whole must be taken. Now, in this confession, sworn to by Col. Suttle's own witness, Burns said he did not run away, but fell asleep on board a ship and was brought away. This statement being brought in by Col. Suttle's own witness, must be taken by this claimant as true. He cannot be allowed to doubt or contradict it. If it be true, then Burns was not a fugitive slave, and so not within the Fugitive Slave Law provisions. Our own Supreme Court has decided (see 7 Cushing, 298) that a slave on board a national vessel with his master, by express permission of the Navy Secretary, who had been landed in Boston in consequence of Navy orders, against the wish of the master, and of course by no action of the slave, could not be reclaimed. To be brought from a slave State is no escape, within the meaning of the law. If taken at all, the whole confession must be taken. If the whole be taken, then the claimant himself has proved that his alleged slave did not escape. If not taken in the whole, then it cannot be taken at all, not even under the tenth section, and then there is no evidence as to identity; and the whole case falls to the ground.

Surely, somewhere among all these wide gaping chasms in the claimant's case, this poor Judge, who pleads he was obliged to do infamous work and accept the case, might have found chance of escape, if he were a learned and humane man!

Mr. Loring contends that he was obliged to issue the warrant in consequence of the oath he took when appointed Judge of Probate, to support the Constitution of the United States. He says: —

"When I was appointed Judge of Probate, I was, by the authority of the people of Massachusetts, bound by an official oath to support the Constitution of the United States; this is to be done only by fulfilling the provisions of the Constitution, and of those laws of the United States which are constitutionally made to carry the Constitution into effect. And on the authority of the Supreme Judicial Court of Massachusetts, I confidently claim that in my action under the U. S. Act of 1850, I exactly complied with the official oath imposed on me by the authority of the people of Massachusetts."

A simple illustration will show the absurdity of this claim. If the "official oath" to the Constitution of the United States, which he says Massachusetts required him as Judge of Probate to take, really binds him to execute all the laws of the Union, in every capacity, then such execution becomes a part of his *official duty*, since it was as a Judge of Probate,

and only as such, that he took the "official oath." It follows, then, that if Marshal Freeman should direct Judge Loring to aid in catching a slave, and he should refuse, the House of Representatives could impeach him for *official misconduct*. I think no one but a Slave Commissioner will maintain that this is law.

Mr. Loring contends that he was bound to issue the warrant, holding as he did the office of Commissioner! Who obliged him to hold the office? Could he not have resigned, as many, young Kane of Philadelphia, and others, did, when first the infamous act made it possible that he should be insulted by an application for such a warrant? There was a time when all of us would have deemed such an application an insult to Edward G. Loring. Could he not have resigned when the application was made, as Capt. Hayes of our Police did, when called on to aid in doing the very act which Mr. Loring had brought like a plague on the city? Could he not have declined to issue the warrant or take part in the case, as B. F. Hallett was reported to have done in the case of William and Ellen Crafts?

But whether he could or not, matters not to you, gentlemen. Massachusetts has a right to say what sort of men she will have on her Bench. She does not complain if vile men will catch slaves. She only claims that they shall not, at the same time, be officers of hers. Mr. Loring had his choice, to resign his judgeship or his commissionership. He chose to act as Commissioner, and, of course, took the risk of losing the other office whenever the State should rise to assert her laws. Nobody can complain that he is not allowed to hold a Probate Court one hour and a Slave Court the next. Certainly, it is not too much to claim for Massachusetts the poor right to say, that when the "legalized robber," "the felonious slave-trader," (these are Channing's words,) comes here, he shall not be able to select agents for his merciless work from those sitting on our Bench and clothed in our ermine.

One single line of this Remonstrance goes far to show the hollowness of all the rest: "In this conviction, the Commissioners, *refusing all pecuniary compensation*, have performed their duties to the Constitution and the law." If the "pieces of silver" are clean, and have no spot of blood, why do all our Commissioners refuse to touch them? And why, when accused of executing this merciless statute, (all men seem to think it an *accusation*,) does each one uniformly plead in extenuation or atonement that he refused the fee? Is it any real excuse for doing an infamous act, that one did it for nothing? There is something strange in this. Ah, gentlemen, not all the special pleading in the world, not "all the perfumes of Arabia, can sweeten" that accursed gold.

There is one paragraph in this remonstrance which deserves notice, as showing either great ignorance or great heedlessness in one who claims to sit on a Judicial Bench. Mr. Loring says: —

"In the year 1851, the act of Congress of 1850 was declared, by the unanimous opinion of the Justices of the Supreme Judicial Court of the Commonwealth of Massachusetts, to be a constitutional law of the United States, passed by Congress in execution of the 4th article of the Constitution of the United States, and as such the supreme law of Massachusetts (7 Cush. Rep. 285): And in exposition of the subject, after reference to the nature of the Constitution of the United States, as a compromise of mutual rights, creating mutual obligations and duties, it was declared (page 319):

'In this spirit and with these views steadily in prospect, it seems to be the duty of all Judges and Magistrates to expound and apply these provisions in the Constitution and laws of the United States, and in this spirit it behoves all persons bound to obey the laws of the United States, to consider and regard them.'

"And this authoritative direction as to the duties of the magistrates and people of Massachusetts was given in direct reference to the 4th article of the Constitution of the United States, the U. S. Act of 1850, and the laws of Massachusetts, as they then were and have ever since been."

Observe the language: "It was declared," by the Court, of course, and it is an "authoritative direction as to the duties of magistrates." You conclude, gentlemen, as every reader would, and would have a right to conclude, that this sentence, quoted from the 319th page of Cushing's Reports, is part of a decision of our Supreme Court. Not at all, gentlemen; it is only a note to a decision, written, to be sure, by Judge Shaw, but on his private responsibility, and no more an "authoritative direction" to magistrates and people than any casual remark of Judge Shaw to his next door neighbor as they stand together on the sidewalk. In his decision in the Burns case, Mr. Loring refers to the Sims case, above cited, (7 Cushing, 285,) "as the unanimous opinion of the Judges of the Supreme Court of Massachusetts," and then quotes this same sentence as part of the opinion, terming it "the wise words of our revered Chief Justice IN THAT CASE." Could this important mistake, twice made, on solemn occasions, be mere inadvertence? If he knew no better, he seems hardly fit for a Judge. If any of his friends should claim he did know better, then, surely, he must have intended to deceive, and that does not much increase his fitness for the Bench.

Mr. Chairman, there is one view of the Burns case which has not, I believe, been suggested. It is this. Massachusetts declares that the fugitive slave is constitutionally entitled to a jury trial. It is the general conviction of the North. Mr. Webster had once prepared an amendment to the Fugitive Slave Act securing jury trial. A Commissioner of

humane and just instincts, would be careful to remember that this Act made him both Judge and Jury. Now, does any man in the Commonwealth believe that a jury would have ever sent Burns into slavery with six witnesses against one as to his identity, and his confession as much in his favor as against him? Mr. Loring knows, this day, that he sent into slavery a man whom no jury that could be empannelled in Massachusetts would have condemned. I might add, whom no Judge but himself, now on our Bench, would have condemned on the same evidence.

The friends of Mr. Loring, in the streets, tell us it is hard to hold him accountable for this decision; that all the world knows he did not make it—powerful relatives and friends dictated it to him. Gentlemen, the apology seems worse even than our accusation. A man whose own heart does not lead him to be a slave-catcher, allow himself to be made the tool of others for such business! Besides, does this excuse prove him so very fit, after all, to sit on the Probate Bench? What if he should allow able relatives and friends to dictate his decisions there also?

Gentlemen, I have not enlarged, as I might have done, on the general principle that, without alleging special misconduct, the mere fact of Mr. Loring's consenting to act at all as a Slave Commissioner, is sufficient cause for his removal from the office of a Massachusetts Judge. To consent actively to aid in hunting slaves here and now, shows a hardness of heart, a merciless spirit, a moral blindness, an utter spiritual death, that totally unfit a man for the judicial office. No such man ought or can expect to preserve the confidence of the community, which is essential to his usefulness as a Judge. Neither can Mr. Loring claim that he had not full warning that such would be the case. To our shame we must confess, that the State has submitted to the execution of the Slave Act within her limits. But, thank God, we are justified in claiming that she submitted in sad, reluctant, sullen silence; that while she offered no resistance to the law, as such, she proclaimed, in the face of the world, her loathing and detestation of a slave hunter. In the words of Channing: —

"The great difficulty in the way of the arrangement now proposed, is the article of the Constitution requiring the surrender and return of fugitive slaves. A State, obeying this, seems to me to contract as great guilt as if it were to bring slaves from Africa. No man, who regards slavery as among the greatest wrongs, can in any way reduce his fellow creatures to it. The flying slave asserts the first right of a man, and should meet aid rather than obstruction. . . . . *No man among us, who values his character, would aid the slave-hunter. The slave-hunter here*

would be looked on with as little favor as the felonious slave-trader Those among us, who dread to touch slavery in its own region, lest insurrection and tumults should follow change, still feel, that the fugitive who has sought shelter so far, can breed no tumult in the land which he has left, and that, of consequence, no motive but the unhallowed love of gain can prompt to his pursuit; and when they think of slavery as perpetuated, not for public order, but for gain, they abhor it, *and would not lift a finger to replace the flying bondsman beneath the yoke.*"

The Legislature, the press, the pulpit, the voice of private life, every breeze that swept from Berkshire to Barnstable, spoke contempt for the hound who joined that merciless pack. Every man who touched the Fugitive Slave Act was shrunk from as a leper. Every one who denounced it was pressed to our hearts. Political sins were almost forgotten, if a man would but echo the deep religious conviction of the State on this point. When Charles Sumner, himself a Commissioner, proclaimed beforehand his determination not to execute the Fugitive Slave Act, exclaiming, in Faneuil Hall, "I was a man before I was a Commissioner!" all Massachusetts rose up to bless him, and say, Amen! The other Slave Commissioner who burdens the city with his presence, cannot be said to have lost the respect and confidence of the community, seeing he never had either. But slave-hunting was able to sink even him into a lower depth than he had before reached.

The hunting of slaves is, then, a sufficient cause for removal from a Massachusetts Bench. Indeed, I should blush for the State if it were not so. I am willing this case should stand for ever as a precedent. Let it be considered as settled, that when a Judge violates the well-known, mature, religious conviction of the State on a grave and vital question of practical morality, having had full warning, such violation shall be held sufficient cause for his removal. This principle will do no shadow of harm to the independence of the Bench. Mr. Chairman, as I have before remarked, the Bench is weakened when we retain a bad Judge, not when we remove him.

I am glad that the facts of the case are such, that we can remove Mr. Loring without violating in the least tittle the proper independence of the Judiciary; that Massachusetts can fix the seal of her detestation on the Slave Act by so solemn a deed, without danger to her civil polity. But, Mr. Chairman, I frankly confess, that if the case had been otherwise, if it had been necessary to choose between two alternatives, (while I value as highly as any man can an independent Judge,) better, far better, in my opinion, to have, for Judges, dependent honest men, than independent slave-catchers.